

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

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DENNIS MACLEOD,  
Petitioner,

and

THUNDER VALLEY CASINO,  
Employer,

Case No. 20-RD-2488

and

UNITE HERE LOCAL 49,  
(Union).

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PETITIONER DENNIS MACLEOD'S REQUEST FOR REVIEW

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Glenn M. Taubman, Esq.  
c/o National Right to Work Legal  
Defense Foundation  
8001 Braddock Road, Suite 600  
Springfield, VA 22160  
(703) 321-8510  
**gmt@nrtw.org**

Attorney for Petitioner Dennis MacLeod

On June 29, 2010, Acting Regional Director Tim Peck dismissed as “untimely” the Petition for a Decertification Election filed by Petitioner Dennis MacLeod. Pursuant to NLRB Rules & Regulations Section 102.67, Petitioner hereby submits this Request for Review. This Request for Review should be granted because this case presents substantial questions of law and public policy under the Board’s decision in Dana Corp., 351 NLRB 434 (2007).<sup>1</sup>

**I. ISSUE PRESENTED:**

In Dana Corp., 351 NLRB 434 (2007), the Board recognized that the NLRA’s paramount policy is employee free choice, and that such free choice is best protected via secret ballot elections, where, unlike “card checks,” employees cannot be intimidated or coerced in the selection (or non-selection) of a union representative. The Board therefore held that employees have 45 days after notice of the employer’s “voluntary recognition” of a union to file for a secret ballot election via a decertification petition (or via a certification petition if filed by a rival union).

Here, following a suspect “card check recognition,” Petitioner Dennis MacLeod and more than 30% of his fellow employees filed for such a decertification election under the principles of Dana Corp. Through a quirk of the calendar, the 44th day of the Dana

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<sup>1</sup> The undersigned attorney was retained today by Petitioner MacLeod. We understand that he filed a pro se Request for Review yesterday. The instant Request for Review, which is also timely, should be considered as either a supplement to, or a replacement of, Mr. MacLeod’s pro se filing.

Corp. “window period” was a Saturday and the 45th day was a Sunday. The Petitioner faxed and mailed the petition to Region 20 on the 44th day (Saturday) following the posting of the notice. However, the Region deemed the petition as not received until the following business day, a Monday (the 46th day following the posting of the Dana Corp. notice), and dismissed it as untimely.

The issue presented is whether the Petitioner’s petition for a secret ballot election should be considered untimely and subject to dismissal because the Board was closed on the 44th and 45th day that the petition could be filed under Dana Corp.

## **II. STATEMENT OF THE FACTS:**

On a date not currently known to the Petitioner, a “card check recognition” occurred between UNITE HERE Local 49 and the Thunder Valley Casino. In the months since that “card check recognition,” hundreds of additional employees have been hired by the employer, thus raising the question of whether the hurried and secret “card check recognition” actually represents the views of a representative complement of employees.

In any event, on April 29, 2010, a notice to employees was posted at the Thunder Valley Casino, advising them of their rights under Dana Corp. to petition for an election within 45 days. The Petitioner and his fellow employees did not believe that a representative complement of employees had agreed to union representation under the “card check” process, and they were alarmed at the manner in which the union had been thrust upon them. They therefore proceeded to exercise their rights and collect signatures

for a secret ballot election. The 44th day of the allotted 45-day period was Saturday, June 12, 2010, and the 45th day of the allotted period was Sunday, June 13, 2010. On Saturday, June 12, 2010, the Petitioner faxed a copy of his Petition to Region 20, and deposited the same in the U.S. Mail. Needless to say, the Board was closed those days. However, the Dana Corp. notice that was posted in the workplace said nothing about “calendar days,” and it said nothing about the Board being closed to receive faxes and mailings on Saturdays and Sundays.

The Region deemed the “filing date” of the Petition to be the next business day when the Board was open, Monday, June 14, 2010. Applying a reflexive and unbending count of the 45-day “window period” set forth in Dana Corp., the Acting Regional Director dismissed the Petition for a secret ballot election as untimely. No reference was made in the dismissal letter to the fact that the Board was closed for the last two days of Petitioner’s 45-day Dana Corp. “window period,” so that, in actuality, Petitioner and his fellow employees had been given only 43 days. This Request for Review follows.

### **III. ARGUMENT:**

#### **A). Dana Corp. fosters a critical part of national labor policy.**

The decision in Dana Corp., 351 NLRB 434 (2007), was carefully considered by a five-member Board.<sup>2</sup> After the Board granted the initial Request for Review, Dana Corp.,

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<sup>2</sup> The rationale of the majority opinion in Dana Corp. is adopted herein by reference and will not be repeated at length.

341 NLRB 1283 (2006), it publicly solicited amicus briefs to assist with its analysis and make sure all interested parties were heard. In response to the Board's solicitation, several dozen such briefs were filed.<sup>3</sup>

Upon reviewing these extensive amicus briefs and the parties' briefs, the Board issued a well-reasoned decision in Dana Corp. that carefully balanced the stability of relationships created by "voluntary recognition" with the need to protect employees' Section 7 rights to join a union or refrain from unionization. The Board properly recognized that, while there may be competing interests at stake, the paramount policy of the NLRA is protecting employees' right to freely join a union or to refrain from unionization under Section 7. See, e.g., Pattern Makers League v. NLRB, 473 U.S. 95 (1985) (paramount policy of the NLRA is "voluntary unionism"); Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers . . . ."); "International Ladies Garment Workers v. NLRB, 366 U.S. 731, 738-39 (1961) (deferring to even a "good-faith" determination that a union has majority employee support "would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act--that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives"); Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 304, 307 (1974); NLRB v. Gissel

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Packing Co., 395 U.S. 575, 602 (1969) (“secret elections are generally the most satisfactory--indeed the preferred--method of ascertaining whether a union has majority support”); Brooks v. NLRB, 348 U.S. 96 (1954) (“an election is a solemn and costly occasion, conducted under safeguards to voluntary choice”).

Thus, the Board in Dana Corp. determined that the so-called “voluntary recognition bar” needed to be modified, to give employees the opportunity for a secret ballot election in the event that their employer’s “voluntary recognition” of a particular union did not actually represent the employees’ free choice. The Board decided to slightly alter – but not eliminate – the voluntary recognition bar. The Board understood that its ruling would cause only minimal delay and interference with the newly formed “voluntary recognition” relationship, while greatly enhancing employee freedom of choice. Indeed, the Board took the unprecedented step of applying the new rule prospectively, so as not to undermine any on-going bargaining relationships.

The Board in Dana Corp. recognized that the “safety value” of a secret ballot election is needed by employees subject to “voluntary recognition agreements” because of frequent employer and union “back room deals” over recognition, whereby employees are pressured or misled to sign union authorization cards. See, e.g., Duane Reade, Inc., 338 NLRB 943 (2003) (employer unlawfully assisted UNITE and unlawfully granted

recognition).<sup>4</sup>

In short, while so-called “voluntary recognition” may be *an* element of the federal labor policy, it does not trump the elements of federal policy that are actually favored: employee free choice via secret ballot elections, unimpeded by union or employer pressure and misrepresentations. See Dana Corp., 351 NLRB at 439, where the Board made specific findings about union “card check” campaigns:

[U]nion card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees’ representational options. As to the former, misrepresentations about the purpose for which the card will be used may go unchecked in the voluntary recognition process. Even if no misrepresentations are made, employees may not have the same degree of information about the pros and

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<sup>4</sup> The cases where an employer conspired with its favored union to secure “recognition” of that union are legion. See, e.g., Fountain View Care Center, 317 NLRB 1286 (1995), enforced, 88 F.3d 1278 (D.C. Cir. 1996) (supervisors and other agents of the employer actively encouraged employees to support the union); NLRB v. Windsor Castle Healthcare Facility, 13 F.3d 619 (2d Cir. 1994), enforcing 310 NLRB 579 (1993) (employer provided sham employment to union organizers and assisted their recruitment efforts); Kosher Plaza Super Market, 313 NLRB 74, 84 (1993); Brooklyn Hospital Center, 309 NLRB 1163 (1992), aff’d sub nom. Hotel, Hosp., Nursing Home & Allied Servs., Local 144 v. NLRB, 9 F.3d 218 (2d Cir. 1993) (employer permitted local union, which it had already recognized as an exclusive bargaining representative, to meet on its premises for the purpose of soliciting union membership); Famous Casting Corp., 301 NLRB 404, 407 (1991) (employer actions unlawfully supported union and coerced the employees into signing authorization cards); Systems Mgmt, Inc., 292 NLRB 1075, 1097-98 (1989), remanded on other grounds, 901 F.2d 297 (3d Cir. 1990); Anaheim Town & Country Inn, 282 NLRB 224 (1986) (employer actively participated in the union organizational drive from start to finish); Meyer’s Café & Konditorei, 282 NLRB 1 (1986) (employer invited union it favored to attend hiring meeting with employees); Denver Lamb Co., 269 NLRB 508 (1984); Banner Tire Co., 260 NLRB 682, 685 (1982); Price Crusher Food Warehouse, 249 NLRB 433, 438-49 (1980) (employer created conditions in which the employees were led to believe that management expected them to sign union cards).

cons of unionization that they would in a contested Board election, particularly if an employer has pledged neutrality during the card solicitation process.

See also Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2414 (2008) (“§ 7 calls attention to the right of employees to refuse to join unions, which implies an underlying right to receive information opposing unionization”); HCF, Inc., 321 NLRB 1320 (1996) (recounting union threats to force employees to sign authorization cards). No party can argue with a straight face that “card check” campaigns provide more protection of employee freedom than a secret ballot election, and the Board was correct in Dana Corp. in balancing the competing interests in the way that it did.

**B). The Board should construe Dana Corp. in a liberal manner to effectuate employee free choice, not to kill it in its cradle.**

Here, through an arbitrary quirk in the calendar, the 44th and 45th day of the Petitioner’s Dana Corp. 45-day time period occurred on a Saturday and a Sunday. Thus, simply because the Board was closed for those two days, the Petitioner and his co-workers have had their 45-day filing period shortened, arbitrarily, by two days. Petitioner asserts that the Acting Regional Director erred in calculating the 45 days in such a reflexive and unbending manner, especially since it was the Board that was closed for the 44th and 45th days of the Dana Corp. “window period.”

The Region’s constricted reading of Dana Corp. should be contrasted with the decision of Region 19’s Director in AT&T Mobility LLC, 19-RD-3854 (Jan. 22, 2010). In that case, the Regional Director held that in cases of inadequate posting of the Dana

Corp. notice, the Board had to err on the side of protecting employees' rights and allowing them extra time to file the election petition. See also Building Technology Engineers, 1-RC-22359 (Sept. 18, 2009) (a late filing for a secret ballot election under Dana Corp. was timely when the posting of the notice of rights was inadequate).

Moreover, the practice of counting the 44th and 45th days as part of the employees' "window period" even though the Board is closed for business is archaic, unfair and wrong. Indeed, the Board's own rules take Saturdays, Sundays and holidays into account when computing almost every deadline under the NLRA. See Section 102.111 of the Board's Rules and Regulations. The same result should be allowed in this case.

Indeed, it must be noted that the lower federal courts and the United States Supreme Court never count deadline dates that fall on Saturdays, Sundays and federal holidays. See Rule 6, Federal Rules of Civil Procedure; Rule 26, Federal Rules of Appellate Procedure; Rule 30, Rules of the United States Supreme Court.

Finally, the Board should apply the "mailbox rule" to the filing of this decertification petition. See Pattern Makers (Michigan Model Mfrs.), 310 NLRB 929 (1993). Under the mailbox rule, Mr. MacLeod's petition was postmarked on Saturday, June 12, 2010, and should be deemed timely filed as of midnight that night. The Board should adopt such a rule as a matter of fairness and justice.

In short, this case demonstrates precisely why so many employees become baffled by, and lose respect for, the Board and its processes. They see the Board's rules and regulations as pitfalls for the unwary. Such unfair results should not be allowed to continue.

CONCLUSION: This Request for Review should be granted.

Respectfully submitted,

/s/ Glenn M. Taubman

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Glenn M. Taubman, Esq.  
c/o National Right to Work Legal  
Defense Foundation, Inc.  
8001 Braddock Road, Ste. 600  
Springfield, VA 22160  
Telephone: (703) 321-8510  
Fax: (703) 321-9319  
**gmt@nrtw.org**

Counsel for Petitioner Dennis MacLeod

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Request for Review was e-filed with the NLRB Executive Secretary and sent via e-mail and the U.S. Postal Service, first-class postage prepaid, to:

Jill C. Peterson, Esq.  
Korshak, Kracoff, Kong & Sugano, LLP  
2430 J Street  
Sacramento, CA 95816  
**Jill@kkks.com**

Kristin L. Martin, Esq.  
Davis Cowell & Bowe LLP  
595 Market Street, Ste. 1400  
San Francisco, CA 94105  
**klm@dcbsf.com**

and by U.S. Postal Service, first-class postage prepaid, to:

Ms. Lisa Grewohl  
Thunder Valley Casino  
1200 Athens Avenue  
Lincoln, CA 95648

UNITE HERE Local 49  
1796 Tribute Road, Ste. 200  
Sacramento, CA 95815

and by NLRB e-filing to:

Regional Director  
National Labor Relations Board, Region 20  
901 Market Street, Ste. 400  
San Francisco, CA 94103-1735

this 13th day of July, 2010

/s/ Glenn M. Taubman

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Glenn M. Taubman